Court of Appeals, State of Michigan

ORDER

HILDA R. GAGE
Presiding Judge

GLORIA JEAN SIMMONS v SAMIR BAZZI

PATRICK M. METER

Docket No. 246837

KAREN M. FORT HOOD
Judges

LC No. 00-013220 NO

On the Court's own motion, the May 6, 2004, unpublished per curiam opinion in this matter is hereby amended to correct a clerical error.

Page Two, first paragraph, line 10 shall now read:

"...suit against defendant based on premises liability and respondeat superior."

HILDA R. GAGE
Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 20 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

GLORIA JEAN SIMMONS,

Plaintiff-Appellant,

v

SUNOCO INCORPORATED (R & M),

Defendant-Appellee,

and

SAMIR BAZZI, I & B MINI-MART CORPORATION, ABDUL A. BEYDOUN, YOUSEF SAFIEDINE, NAHLA SAFIEDINE, KAZAM SAFIEDINE, JEAN SAFIEDINE, RJA FAHS, and KAMELA SAFIEDINE,

Defendants.[1]

UNPUBLISHED
May 6, 2004

No. 246837
Wayne Circuit Court
LC No. 00-013220-NO

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Sunoco, Inc. (R & M). We affirm.

In September 1999, plaintiff was staying at a hotel near Eight Mile Road in the city of Detroit. Plaintiff visited a gas station that advertised the sale of Sunoco gasoline. She purchased cigarettes, bread, and bologna from the station. Although a party story was located closer to the hotel, plaintiff chose to walk further to the gas station for safety purposes. In her deposition, plaintiff testified that patrons at the party store lingered in the parking lot to drink and smoke. The gas station sold items such as milk, juice, and bread. Patrons of the gas station generally

[1] The claims against all other defendants were submitted to arbitration and are not at issue on appeal.

made their purchases and left the premises. There was nothing "special" about the gas station's advertisement as a Sunoco station. Rather, the patronage of the gas station as opposed to that of the party store caused plaintiff to visit the gas station.

The next day, plaintiff returned to the gas station. She needed a microwave to heat food that she had brought with her from the hotel. The clerk at the gas station allowed her to use the microwave without charge. While plaintiff was in the store, two individuals were purchasing lottery tickets. After the individuals left the station, the clerk allegedly locked the door and began to sexually fondle plaintiff. She struggled with the clerk, and he began to strike her. The clerk left her and allowed a new customer to enter the store. Plaintiff was in shock and did not immediately leave the store. Rather, she asked the new customer not to leave the store without her and followed him out the store. Plaintiff then called police. Plaintiff filed a lawsuit against the individuals and entities that owned and operated the gas station. However, plaintiff also filed suit against defendant based on premises liability and respondent superior. The trial court granted defendant's motion for summary disposition, holding that defendant did not have possession and control of the premises. The trial court also held that there was no evidence to support an agency theory of liability.

Plaintiff alleges that the trial court erred in granting defendant's motion for summary disposition. We disagree. Our review of the grant or denial of summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*.

"Premises liability is conditioned upon the presence of both possession and control over the land." *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). Ownership alone is not determinative. "Possession and control are certainly incidents of title ownership, but these possessory rights can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id*. at 552-553. Rather, a possessor of land is defined as a person who is in occupation of land with the intent to control it. *Id*. at 552. Review of the record reveals that defendant was not in possession and control of the premises. Accordingly, the trial court properly granted summary disposition of the claim of premises liability.

In an agency relationship, the principal sets forth the authority conferred upon his agent, and this authorization cannot be extended by construction. *Jeffrey v Hursh*, 49 Mich 31, 32; 12 NW 898 (1882). The plaintiff's impression or characterization of the relationship is not controlling. *Goodspeed v MacNaughton, Greenawalt & Co*, 288 Mich 1, 7-8; 284 NW 621 (1939). The burden of proof of the authorization of the agency relationship rests with the plaintiff. *Id*. The determination of the creation of the agency relationship is assessed by examining the relations of the parties based on their agreements or acts. *Saums v Parfet*, 270

Mich 165, 171; 258 NW 235 (1935). It is incumbent on the party relying on the agency relationship to show what authority the agent actually had. *Selected Investments Co v Brown*, 288 Mich 383, 388; 284 NW 918 (1939). The acts of an agent may bind the principal where the authority of the agent is apparent. Apparent authority may arise where the actions of the purported agent lead a third party to the reasonable belief that an agency relationship exists. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 528; 529 NW2d 318 (1995). However, apparent authority must be traced to the principal and cannot be established through the acts of the agent. *Id*.

Plaintiff testified that she chose to visit the gas station because of the nature of its clientele. Unlike the party store that was closer to plaintiff's hotel, patrons of the gas station did not appear to linger in the parking lot. However, patrons of the party store typically drank and gathered in the parking lot. Plaintiff did not identify any representations or actions by defendant as the principal that caused her to visit that particular gas station which advertised the sale of Sunoco gasoline. Thus, plaintiff cannot succeed based on a claim of apparent authority. Moreover, plaintiff did not establish through defendant's contractual agreement that it could be held accountable or assumed liability for the acts of the station's employee. *Selected Investments, supra*. Plaintiff's impression of the relationship between defendant and the station operators is not controlling. *Goodspeed, supra*. Accordingly, the trial court's grant of summary disposition of the agency claim was proper.[2]

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[2] We note that plaintiff contends that a factual issue regarding the agency relationship precludes summary disposition, citing *Green v Shell Oil Co*, 181 Mich App 439; 450 NW2d 50 (1989) and *Johnston v American Oil Co*, 51 Mich App 646; 215 NW2d 719 (1974). However, those decisions were rendered prior to the Supreme Court's clarification of the burden upon the respective parties in moving for and opposing a motion for summary disposition. *Maiden, supra*. Accordingly, plaintiff's contention is without merit.